

Supreme Court, U. S.

FILED

MAY 26 1978

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

77-1850

CORINNE GRACE,
Petitioner,

vs,

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, CORRINNE GRACE, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on April 28, 1978.

The Opinion Below

The Memorandum Decision of the Ninth Circuit Court of Appeals is unreported at this time and appears herein as Appendix A. No other written opinions have been delivered.

Jurisdictional Statement

Petitioner seeks review of the judgement of the Ninth Circuit Court of Appeals entered April 28, 1978. See Appendix A. That ruling was filed and entered on April 28, 1978. A petition for rehearing was filed May 9, 1978.

At this writing, petitioner has not received a ruling on her petition for rehearing, however, petitioner is filing this petition for a writ of certiorari in order to comply with the time requirements of Rule 22(2), Rules of the Supreme Court, Title 28 United States Code. This petition for certiorari was filed less than 30 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Appellant was tried and convicted of aiding and abetting a bank officer in the willful misapplication of bank funds, a federal crime having specific criminal intent to defraud as an essential element. Lack of intent to defraud on the part of the bank officer, the principal, was the critical hinge-pin of petitioner's defense at the trial. The bank officer testified that his motive in honoring petitioner's overdrafts was to

keep petitioner as a client since she was his largest account, that he always expected that the money would come in to cover the account, and that he acted in what he perceived to be the best interests of the bank, trying his best to hold on to a valuable client and keep this large account for the bank. The prosecutor himself described the bank officer as "a sucker or simply an honest fool". (RT 520).

At the trial, the jury was instructed, over defense counsel's objection:

Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with the desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. (RT 569).

The questions thereby arising are:

1. Did this "Mann" type instruction effectively negate the requirement of a finding by the jury of specific intent to defraud or injure the bank, impermissibly shift the burden of proof to the defendant and conflict with presumption of innocence, thus constituting reversible error?

2. Was there insufficient evidence that the principal, the bank officer, had the requisite intent to defraud in order to convict appellant as an aidor and abettor, where there was no evidence of any profit motive on the part of the bank officer (RT 59-66, 62, 257), the bank officer testified he believed petitioner had ample funds to meet her indebtedness to the bank, that he honored petitioner's overdrafts to keep what he considered his largest account and valuable customer to the bank, (RT 256-257) and the prosecutor described the bank officer as "a sucker or simply an honest fool"? (RT 520).

Statutory Provisions Involved

Title 18 of the United States Code, Section 2, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 of the United States Code, Section 656, states:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Statement of Facts

1. Jurisdictional Facts.

An indictment (CR 1) was filed herein on January 5, 1977, charging violations of Title 18, United States Code, Sections 2 and 656. Petitioner was arraigned in absentia and entered a plea of not guilty on January 19, 1977. (CR 16). On March 9, 1977 a superseding indictment was filed. (CR 60).

The case came on for trial on April 4, 1977, before United States District Judge Martin Pence (CR 80). Petitioner had a trial by jury (CR 84) and the jury found the petitioner guilty as indicted in Count 1 of the indictment on April 7, 1977. (CR 143). On April 27, 1977, Judgement was entered and petitioner was sentenced to custody for a period of one year and one day and a \$5,000.00 fine imposed.

A Motion to Stay Execution of Sentence and for Release Pending Appeals (CR 170) was filed March 4, 1977 (CR 171) and a Notice of Appeal was filed on May 9, 1977 (CR 174). Petitioner was released on her own recognizance subject to the terms and conditions of the Court Order entered on May 16, 1977. (CR 180).

The Trial Court has jurisdiction by way of provisions of Title 18, United States Code 656, 2. The United States Court of Appeals for the Ninth Circuit had jurisdiction under Title 29, United States Code, Section 1291.

2. Facts Pertaining to the Issue Presented.

The evidence adduced at trial was that petitioner had overdrafted her checking account in the sum of nine hundred twenty eight thousand four hundred eighty six dollars and eight cents. (\$928,486.08) (R.T. 73-74). This was accomplished largely through the actions of a branch manager of the Bank, Mr. KENNETH MILLER, (RT 86-90) who was indicted as the principal in this case, pled guilty to count 1 of the Indictment, (RT 263) and received probation.

Upon discovery of the overdraft by Mr. MILLER'S superiors at the Bank, a loan agreement was executed by petitioner, her husband, and the bank, collateralized by property having a value of 125% the amount of the loan. The note provided for interest at the rate of 10% on the overdrafts, attorneys fees, costs to the bank and substantial overdraft charges. Additionally, the note provided that should the collateral be diminished the bank had the right to demand additional collateral. (RT 113-120, 122-123, 137-138).

The crux of petitioner's defense at trial was that Mr. MILLER lacked the requisite intent to injure or defraud the bank, therefore petitioner could not be convicted as an aidor and abettor. In support of petitioner's contention that Mr. MILLER lacked the requisite intent to defraud was the testimony of Mr. MILLER that he never at any time received any favors, gifts, or monies from the Graces for any of his actions on behalf of petitioner at the bank. (RT 220-221). MILLER testified "he did not receive a nickel out of this transaction...and thought ultimately they [petitioner and her husband] would get the money to cover the overdraft." (RT 248).

MILLER testified that his motives in honoring petitioner's overdrafts were:

"To keep the Graces as a client since they were his largest single account, one.

No. 2. He felt the situation was only a temporary problem and was confident that the Graces had sufficient assets to fully protect the Bank from any loss".(RT 253).

Mr. MILLER testified that there was always the expectation the money would come in to cover the account and that he called petitioner day after day trying to get the money to cover the account. (RT 254). Additionally, Mr. MILLER testified there was never any idea in his head that he wanted to injure or defraud the bank and that he believed once the matter was straightened out, petitioner would be a good customer for the bank. (RT 256-257).

The trial judge instructed the jury, over the objection of defense counsel, that:

Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is nonetheless a violation of the statute, if the necessary effect is or may be to injure or defraud the bank.

The ultimate or future possibility or probability of benefit to the bank, that's not a defense to aiding and abetting a misapplication of bank money and funds. (RT 569).

Additionally, the jury was instructed in pertinent part:

Now to establish the offense charged in the Indictment the Government must prove that a crime was committed by Kenneth Miller...(RT 564).

...you do have to pass upon whether or not the Government has proved beyond a reasonable doubt that Miller committed the illegal act charged (RT 575-576).

After the jury had deliberated for a considerable period of time it became apparent there was confusion among the jurors as to whether they were required to deliberate on the charges concerning petitioner only, not Mr. Miller. The jury submitted to the court two notes indicating that one of the jurors "thought that the jury was to deliberate on the charges concerning Mrs. GRACE only, not Mr. Miller." (RT 581). In an attempt to clarify this confusion the Judge gave supplemental instructions to the jury, most of which were accurate, however, the jury was instructed in pertinent part:

If you should find that Miller did not commit the crime charged, irrespective whether he pled guilty to it or not, that's immaterial. (RT 582).

Petitioner contended on appeal to the Ninth Circuit Court of Appeals that her conviction should be reversed because a prejudicial so-called "Mann" instruction was given to the jury concerning the issue of intent to defraud or injure the bank. The decision of the Ninth Circuit Court of Appeals affirmed appellant's conviction without addressing the issue of the so-called "Mann" instruction stating that the instructions fairly and accurately reflect the applicable law. (Appendix A attached hereto). That ruling was filed and entered on April 28, 1978. A petition for rehearing was filed May 9, 1978, on the grounds that the Ninth Circuit overlooked appellant's argument concerning use of the "Mann" instruction. At this writing appellant has not received a ruling on her petition for rehearing and is filing this writ of certiorari in order to comply with the time requirements of Rule 22(2), Rules of the Supreme Court, Title 28 United States Code.

Reasons for Granting the Writ

The United States Circuit Courts of Appeals are in conflict concerning the propriety of the so-called "Mann" type instruction such as was given in petitioner's case. This issue has spawned a vast progeny of litigation and is of a recurring nature in federal white-collar criminal cases having intent as a requisite element. The Supreme Court should grant certiorari to decide this issue once and for all and to provide guidance to the Circuit Courts in this area due to the increased emphasis on white-collar criminal prosecutions by federal law enforcement agencies and the consequent increase in white-collar prosecutions burdening the federal judicial system.

Probably no other jury instruction has ever received so much attention and criticism, particularly in the Fifth and Ninth Circuits, as the so-called "Mann" instruction. Despite its criticism, the "Mann" instruction has continued to "rear its ugly head once again. This charge is so infamous that in the standard text on federal jury instructions its use is referred to as an invitation to reversible error." *United States v. Chiantese*, 546 F. 2d 135, 136 (5th Cir. 1977); Devitt and Blackmar, *Federal Jury Practice and Instructions*. 1970 § 13.06 p. 277.

Rule 19(b) Supreme Court Rules, Title 28, United States Code, indicates that a substantial reason for granting certiorari is to resolve a conflict among the Circuit Courts of Appeals on the same matter. A number of cases have similarly recognized this concept. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1977); *F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179 (1967); *United States v. Behrens*, 735 U.S. 162 (1963); *Downum v. United States*, 372 U.S. (1963); *Prince v. United States*, 352 U.S. 322 (1956); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Affronti v. United States*, 350 U.S. 75 (1955).

Consequently, the so-called "Mann" instruction issue should be resolved by this court because of the continual recurrence of that question and the ambiguous use of that instruction.

See, *Cohen v. United States*, 378 F. 2d 751, 755 (9th Cir. 1967), cert. den. 389 U.S. 897; *United States v. Chiantese*, 546 F. 2d 135, 136 (5th Cir. 1977). *United States v. Robinson*, 545 F. 2d 301 (2d Cir. 1976); *United States v. Arthur*, 544 F. 2d 730, 736 (4th Cir. 1976); *United States v. Barash*, 365 F. 2d 395 (2d Cir. 1966).

At least two Circuits, the D.C. Circuit and the Sixth Circuit have held use of "Mann" type instructions did not constitute reversible error, although they did so with some reservation. *United States v. Moore*, 435 F. 2d 113, 116 (D.C. Cir. 1970); *United States v. Haldeman*, 559 F. 2d 31, 116 (D.C. Cir. 1976) cert. denied 97 S. Ct. 2641; *United States v. Releford*, 352 F. 2d 36, 40 (6th Cir. 1965) cert. denied, 86 S. Ct. 562. The above cited authorities indicate there is substantial conflict and confusion among the Circuits on the "Mann" instruction. Certiorari should be granted to resolve the conflict and provide guidance to the lower courts.

Conclusion

This Court has not directly considered the issue whether "Mann" type instructions effectively negate the

requirement of a finding of specific intent, impermissibly shift the burden of proof on this issue to the defendant, and conflict with the presumption of innocence, thus constituting reversible error. Due to the conflict among the Circuits on this issue and its recurring nature and confusion in this area, it is respectfully submitted that this Court should exercise its supervisory power and grant a writ of certiorari to review petitioner's case and resolve this issue once and for all.

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Viewing the evidence in the light most favorable to the government and giving the government the benefit of all inferences that reasonably may be drawn from the evidence,

Glasser v. United States, 315 U.S. 60, 80 (1942), there was sufficient evidence for the jury to find that Miller intended to defraud or injure the bank.

Appellant also challenges the instructions given regarding proof of Miller's intent and the relevance of restitution. The instructions on both of these points fairly and accurately reflect the applicable law and thus were not erroneous.

Appellant also claims that it was error for the trial court to admit evidence which related to counts of the indictment which were dismissed prior to trial. The evidence, which revealed prior acts of misconduct by Appellant, was properly admitted pursuant to Federal Rule of Evidence 404 (b) to prove motive or intent. The jury was properly instructed as to the limited purpose of the evidence.

Appellant claims that certain remarks in the government's closing argument were inflammatory and prejudicial. At trial, defense counsel objected to only one of those remarks. The trial court denied the defense motion for a mistrial upon a finding that the challenged statement, taken in the overall context of the closing argument, was not misleading or erroneous. This court gives great deference to the trial court, which saw and heard the actual events and found no prejudice. See, *Orebo v. United States*, 293 F. 2d 747 (9th Cir. 1961).

As to those remarks which were not objected to at trial, none of them was so prejudicial as to require reversal by this court, particularly in view of the fact that the trial court did not have an opportunity to rule on the objection.

AFFIRMED.

No. 77-1850

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CORRINE GRACE, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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**BRIEF FOR THE UNITED STATES
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. A petition for rehearing was filed on May 9, 1978, and is still pending.¹ The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The Court may wish to defer action on the petition until petitioner has advised it of the action taken on her petition for rehearing.

QUESTIONS PRESENTED

1. Whether the trial court's instruction on intent was correct.
2. Whether the evidence of the principal's intent was sufficient to support petitioner's conviction as an aider and abettor.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of aiding and abetting the misapplication of funds by a bank employee, in violation of 18 U.S.C. 656 and 2. She was sentenced to a term of imprisonment for one year and a day and fined \$5,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner encouraged and abetted Kenneth Miller, the manager of a branch of the Arizona Bank of Phoenix, Arizona, in concealing numerous overdrafts in her account.² Petitioner began to overdraw the account in the summer of 1974 and continued until September 1975, by which time the overdrafts totalled almost \$1,000,000. At one time, early in the scheme, petitioner helped Miller cover up an accumulated \$50,000 overdraft by depositing the required funds (Tr. 165-166, 174). Later, petitioner asked Miller to get approval for loans of \$200,000 and \$600,000. To facilitate the approval, Miller presented petitioner's request to his superiors without informing them that he was continuing to permit petitioner to overdraw her account (Tr. 170). When bank officials discovered petitioner's overdrafts, they classified the deficit as a loan and negotiated a repayment schedule. However, at the time of trial in April 1977, petitioner remained in arrears in her repayment efforts (Tr. 131).

²Miller was indicted as a principal. He pleaded guilty and testified for the government.

Petitioner admitted at trial that she had overdrawn her account by nearly \$1,000,000 in a single three-month period in 1975 (Tr. 368). She did not dispute that she cooperated with Miller in the cover-up. Instead, her defense was that Miller did not commit a crime under Section 656 and therefore that there was no crime she could have abetted. Specifically, her position was that Miller did not intend to defraud the bank but only sought to keep her as a client, and that he believed she would eventually cover the deficit in her account. Since Miller did not intend ultimately to defraud the bank, petitioner argued that he did not have the intent required for conviction under Section 656.

ARGUMENT

1. Petitioner contends (Pet. 2, 7-9) that the trial court's instruction on intent was erroneous. Petitioner's claim is without substance.

Petitioner takes issue with the following charge (Tr. 569):

Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is nonetheless a violation of the statute, if the necessary effect is or may be to injure or defraud the bank.

The ultimate or future possibility or probability of benefit to the bank, that's not a defense to aiding and abetting a misapplication of bank money and funds.

Petitioner's specific complaint is that this constituted a "*Mann*" instruction and was thus error. The *Mann* instruction, named for *Mann v. United States*, 319 F. 2d 404, 407 (C.A. 5), certiorari denied, 375 U.S. 986, states the proposition that the jury may infer that "a person

ordinarily intends the natural and probable consequences of [his] acts.”³ Petitioner correctly notes that use of this instruction has been disapproved by several courts of appeals,⁴ including the court below (see *Bloch v. United States*, 221 F. 2d 786 (C.A. 9)). The principal defect that these courts have discerned in the *Mann* charge is that it can be construed as shifting to the defendant the burden of proving innocent intent. See, e.g., *United States v. Netterville*, 553 F. 2d 903, 917 (C.A. 5), certiorari denied, 434 U.S. 1009.

The charge challenged here was addressed to petitioner’s theory that no crime had been committed because Miller intended ultimately to help rather than to injure the bank. The instruction thus correctly explained a well-established principle of criminal law: that a benign motive is not inconsistent with an intent to engage in unlawful conduct. *United States v. Pomponio*, 429 U.S. 10. The courts of appeals, including some that have disapproved the *Mann* instruction, are in agreement with the court below that the intent requirement of Section 656 is met when a bank employee knowingly misapplies funds in a way that is likely to result in injury to the bank, even if the employee’s motive is benign. See *United States v. Beran*, 546 F. 2d 1316,

³The entire instruction is as follows:

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

⁴See, in addition to the cases cited at Pet. 8, *United States v. Robinson*, 545 F. 2d 301 (C.A. 2); *United States v. Guy*, 456 F. 2d 1157 (C.A. 8), certiorari denied, 409 U.S. 896; *McCarthy v. United States*, 409 F. 2d 793 (C.A. 10), certiorari denied, 396 U.S. 836.

1321 (C.A. 8), certiorari denied, 430 U.S. 916; *Johnson v. United States*, 95 F. 2d 813, 816 (C.A. 4); *Galbreath v. United States*, 257 Fed. 648, 656 (C.A. 6); *United States v. Tokoph*, 514 F. 2d 597, 603-604 (C.A. 10). The instruction in this case simply stated that principle. Unlike the *Mann* instruction, the instruction given in this case did not invite the jury to infer intent “unless the contrary appears from the evidence” or to base its finding of intent on its determination that “one standing in like circumstances and possessing like knowledge should reasonably have expected” the forbidden event to have occurred.

Viewed in the context of the charge as a whole, *Cupp v. Naughten*, 414 U.S. 141, 146-147, the language complained of could not conceivably have prejudiced petitioner, even if the instruction was erroneous. The court instructed that in order to convict petitioner, the jury was required first to find beyond a reasonable doubt that Miller had violated Section 656, and that in so doing he had acted “with intent to injure or defraud the bank” (Tr. 564-565). It then charged that an intent to defraud means an intent to deceive or cheat “for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself or to another” (Tr. 566); that the government had to prove both the act and specific intent beyond a reasonable doubt (Tr. 567); and that “misapplication of funds” as used in the statute meant taking or converting the bank’s funds “wilfully, with the specific intent to injure or defraud the bank” (Tr. 567-568). There is thus no realistic possibility that the court’s instructions as a whole could have been construed as shifting to petitioner the burden of proof on intent or on any other element of the offense.

2. Petitioner states (Pet. 2) but does not argue that the evidence was insufficient to prove Miller’s criminal intent. The court of appeals found the proof sufficient (Pet. App. 11-12), and the record amply supports its conclusion.

The government's evidence established that Miller purposefully manipulated check processing procedures in order to hide petitioner's \$928,000 overdraft. Miller admitted that he had acted improperly in permitting petitioner continually to overdraw her checking account by substantial amounts (Tr. 188). Miller also admitted that he purposely concealed petitioner's substantial overdrafts either by depositing in her account out-of-state checks that she admitted were no good or by resubmitting checks that were not backed by sufficient funds (Tr. 169-172, 183-188). He further admitted that he had intentionally applied to petitioner's overdraft loan monies that petitioner had received from another bank in order to pay off an outstanding Arizona Bank loan (Tr. 179). Miller knew that the result of this conduct would be to leave petitioner's Arizona Bank loans unsecured (Tr. 180). Miller thus in effect extended to petitioner an interest-free, unsecured loan of almost \$1,000,000. At minimum, as Miller well knew, the bank lost "the freedom to invest and loan its funds at its own discretion" (Pet. App. 11). Thus there was more than sufficient proof of Miller's intent to misapply bank funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.